

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCUS R. ELLINGTON,

Plaintiff,

No. CIV S-04-0666 DFL KJM P

vs.

E.S. ALAMEIDA, et al.,

Defendants.

ORDER

Plaintiff is a state prison inmate proceeding pro se with a civil rights action under 42 U.S.C. § 1983. Plaintiff has “struck out” within the meaning of the Prisoner Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g). Nevertheless, this court found portions of his amended complaint satisfied the “imminent danger” exception to the three strikes provisions of the PLRA, recognizing that those portions “state a cognizable claim for relief under 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b)” and directed service on defendants Rohlfig, Salenger and Exum for alleged acts or omissions relating to plaintiff’s medical care. 5/18/2005 Order.

On January 24, 2007, this court issued findings and recommendations, recommending that defendant Salenger and Rohlfig’s motion for summary judgment be granted and plaintiff’s motion for summary judgment be denied. Defendant Exum’s motion for summary judgment is pending.

1 On February 12, 2007 plaintiff filed a motion “to cure deficiency in pleading”
2 and on April 16, 2007, he filed a motion “to strike defendant’s improper filings.” These matters
3 are before the court.

4 I. Motion To Cure Deficiency

5 In granting Rohlfinding’s motion for summary judgment, the court determined, in
6 part, that Rohlfinding did not order plaintiff’s wheelchair removed and that plaintiff’s bare assertion
7 that Rohlfinding issued the order did not defeat summary judgment. 1/24/07 Findings and
8 Recommendations at 10. In this motion to cure the “deficiency” in the complaint, plaintiff seeks
9 to amend to allege that custodial personnel told plaintiff that Rohlfinding ordered the wheelchair
10 removed and/or that Rohlfinding ordered other doctors to remove plaintiff’s wheelchair. Mot. at 1.
11 He also suggests that he would amend to allege that Rohlfinding was the proximate cause of the
12 order removing the wheelchair. Reply at 1.

13 In addition, plaintiff claims that despite his “three strikes” status, he has satisfied
14 the filing fee and is thus free to add claims “against Rohlfinding’s supervisors” for hiring him. Mot.
15 at 2.

16 Neither point is well taken.

17 “Five factors are taken into account to assess the propriety of a motion for leave
18 to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and
19 whether the plaintiff has previously amended the complaint.” Johnson v. Buckley, 356 F.3d
20 1067, 1077 (9th Cir. 2004). In this case, several of the factors support the decision not to permit
21 the amendment. First, plaintiff has delayed in seeking to amend; the action was filed in April
22 2004, yet plaintiff has not explained why he did not notice this “deficiency” in his pleadings
23 until now. Second, it appears that the amendment is offered in bad faith. Plaintiff had the
24 opportunity to submit a declaration in opposition to summary judgment containing these claims,
25 but chose not to do so. Third, amending to include what correctional officers told plaintiff would
26 not “cure the pleading deficiency,” for it offers only a hearsay account of Rohlfinding’s order to

1 remove plaintiff's wheelchair. Fourth, the proposed amendment, coming after the close of
2 discovery and the resolution of the motion for summary judgment, would prejudice the
3 defendant. Kalsi v. New York City Transit Authority, 62 F.Supp.2d 745, 761 (E.D.N.Y. 1998).

4 Plaintiff cannot amend or supplement his complaint to add claims that are not
5 based on imminent danger even though the filing fee may now be completely paid in
6 installments. To avoid the application of the "three strikes" provisions to his complaint, plaintiff
7 was required to pay the full filing fee at the time the action was filed. Dupree v. Palmer, 284
8 F.3d 1234, 1236 (11th Cir. 2002).

9 II. Motion To Strike

10 Plaintiff seeks to strike "all of the unapproved and unauthorized document
11 submitted for filing on: March 6, 2007. That 1) EXCEED THOSE PERMITTED BY MOTION
12 PRACTICE; and 2) prejudice plaintiff." (Reproduced as in original.)

13 On March 6, 2007, defendant Exum filed a reply to plaintiff's opposition to
14 Exum's motion for summary judgment and opposition to plaintiff's cross-motion for summary
15 judgment, objections to plaintiff's statement of undisputed facts, a statement of undisputed facts,
16 a declaration and exhibits in support of the opposition to plaintiff's cross-motion for summary
17 judgment. All of these are permitted by the local rules. L.R. 56-260, 78-230.

18 Although it is not entirely clear, it appears that plaintiff also seeks to strike a
19 portion of defendant Exum's supplement statement of undisputed facts, which asserts that
20 plaintiff's suicide threats were not legitimate. Docket No. 149-1, ¶ 64. This allegation is neither
21 scandalous nor impertinent, for it is relevant to the issues and does not "improperly" cast
22 plaintiff in a derogatory light because it appears to be based on records provided with the motion
23 for summary judgment. Wilkerson v. Butler, 229 F.R.D. 166, 170 (E.D. Cal. 2005) (allegation is
24 "impertinent" if it is not responsive or relevant to the issues; it is "scandalous" if it improperly
25 casts a derogatory light on someone).

1 Accordingly, IT IS HEREBY ORDERED that:

- 2 1. Plaintiff's February 12, 2007 motion to cure the deficiency in his pleadings
3 (Docket No. 141) is denied; and
4 2. Plaintiff's April 16, 2007 motion to strike (Docket No. 156) is denied.

5 DATED: May 23, 2007.

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7 _____
8 U.S. MAGISTRATE JUDGE
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